Nos. 12,195 and 12,196

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, as the District Director of the U. S. Immigration and Naturalization Service for the Northern District of California, *Appellant,* *(Respondent Below)* vs. TADAYASU ABO, et al., etc., *Appellees,* *(Petitioners Below)*	No. 12,195
and	
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BRIEF FOR APPELLEES.

On Appeals from Final Decisions of the District Court of the United States for the Northern District of California, Southern Division, in Habeas Corpus Proceedings.

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STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASES OF COURTS' JURISDICTION.

These are appeals by Bruce G. Barber, in his representative capacity as the District Director of the U. S. I. & N. S. for the Northern District of California from final decisions of the district court below entered on August 11, 1947, awarding the appellees writs of habeas corpus (R. 194) in representative class proceedings brought under Rules 20, 23(1-3), 18a, b, 19a, b, and 81(a) (2), R.C.P., and ordering them discharged from the custody of the appellant. R. 191-195. The causes were decided on motions for summary judgment and on the pleadings, as authorized by the rule laid down in *Walker v. Johnston,* 312 U.S. 275, 284, and by Rules 12(c) and 56(a) R.C.P.

The district court below had jurisdiction of the proceedings below under the provisions of 28 USCA, Secs. 451-452, now Sec. 2241, and this Court has jurisdiction to review those decisions below by virtue of the provisions of 28 USCA, Sec. 463(a), now Sec. 2253, and Sec. 225(a) (first), now Sec. 1294.

The memorandum Opinion of the court below (R. 175-180 and amplification thereof at R. 182-185), is reported in 76 Fed. Supp. 664, and the Opinion of that Court dated April 29, 1948, amplifying its grounds of decision appears at R. 410-427 in the record on appeal in the companion appeals in equity cases Nos. 12251-2 and is reported in 77 Fed. Supp. 806.

The pleadings necessary to show the existence of the jurisdictions are the amended petition for the writ (R. 99); amended return (R. 134); traverse (R. 149); motion for summary judgment (R. 154); cross-motion (R.

161); motion for judgment on pleadings (R. 156); order awarding writ (R. 191) and writ (R. 194).

QUESTION INVOLVED.

Are resident native-born citizens of the United States presently subject to detention and removal to Japan under the Alien Enemy Act as though they were hostile alien enemies simply because while held under duress by the Government in a concentration camp they executed renunciations of U. S. nationality under 8 USCA, Sec. 801(i) during an illegal internment to which they then had been subjected for three years following their original false and unlawful arrest by the U. S. Government for no reason except that they were of Japanese lineage?

OUTLINE OF EVENTS GIVING RISE TO QUESTIONS PRESENTED AND STATUTES AND PROCLAMATIONS, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

In 1798 the Alien Enemy Act was enacted by Congress. As amended and codified in Title 50 USCA, Sec. 21 et seq., it provides, in substance, as follows:

> "Whenever there is a declared war between the United States and any foreign nation or government, * * * and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies * * *"

On December 7, 1941, under the authority conferred upon him by the Alien Enemy Act, President Roosevelt promulgated Executive Proclamation No. 2525 (6 F.R. 6321) which enjoined "all natives, citizens, denizens, or subjects of the Empire of Japan" within our jurisdiction of the age of 14 years and upward "to preserve the peace" and "to refrain from crimes against the public safety". It also admonished them that—

> "All alien enemies shall be liable to restraint or to give security, or to remove and depart from the United States in the manner prescribed by Sections 23 and 24 of Title 50 of the United States Code, and as prescribed in the regulations duly promulgated by the President."

On January 14, 1942, he promulgated Executive Proclamation No. 2537 requiring all alien enemies (Japanese, German and Italian) "To apply for and acquire certificates of identification".

Thereafter, between March 30, 1942, and October 27, 1942, all Japanese nationals and American citizens of Japanese ancestry were evacuated from the coastal areas through the medium of 108 civilian exclusion orders, issued by General J. L. DeWitt. (See 7 F.R. 2581 and 6703 for first and last of these orders.) All the affected persons were imprisoned either in concentration camps called War Relocation Centers or in restrictive zones in military areas Nos. 2 to 6, inclusive, for no reason whatever except that they were of Japanese lineage. On August 13, 1942, the Secretary of War issued Public Proclamation WD-1 (7 F.R. 6593) under which the war relocation centers outside General DeWitt's military department were desig-

nated military areas and the departure of interned citizens and aliens of Japanese ancestry was forbidden. This proclamation demonstrated that the evacuation program in reality was nothing but an imprisoning program from its inception.

Title 8 USCA, Sec. 801(i), was enacted as a wartime statute by the Act of July 1, 1944 (58 Stat. 677), amending Sec. 401(i) of the Nationality Act, for the special purpose of obtaining renunciations of citizens of Japanese lineage detained in our concentration camps. It was rendered inoperative by the Joint Resolution of Congress of July 25, 1947, 61 Stat. 454. It reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense;"

Thereafter, on October 6, 1944, Francis Biddle, as the then Attorney General, set up Secs. 316.1 to 316.9, inc., of Title 8 of *his Nationality Regulations,* under authority of Title 8 USCA, Sec. 801(i), providing the procedure for renunciation of nationality thereunder.

On December 17, 1944, General Pratt promulgated Public Proclamation No. 21 (10 F.R. 53) cancelling the 108 mass civilian exclusion orders which previously had been issued by General DeWitt. (See also Pub. Proc. WD-2 of

January 2, 1945; 10 F.R. 889.) This permitted all previously excluded persons of Japanese extraction to return to the prohibited areas save those, if any, against whom individual exclusion orders thereafter might issue. On September 4, 1945, he promulgated Public Proclamation No. 24[1] (10 F.R. 11760) which was a blanket rescission of all individual civilian exclusion orders then outstanding.

The two military proclamations are executive judgments, based upon official military findings, that not one of the persons of Japanese ancestry who had been excluded from the Western States constituted a threat to our security. In view of these executive findings made by the War Department and by General Pratt who then was in charge of the Western Defense Command it ill became the Attorney General thereafter to assert any of the appellees presented a threat to our security.

On July 14, 1945, under authority of the Alien Enemy Act, President Truman promulgated Proclamation No. 2655 (10 F.R. 8947) providing, in part, as follows:

> "All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have ad-

[1]The Proclamation reads, in part, as follows:

"(a) All Individual Exclusion Orders heretofore issued by the Commanding General, Western Defense Command, and now in effect are rescinded;

(b) The effect of the rescission in paragraph (a) hereof is to remove all restrictions heretofore imposed by or because of Individual Exclusion Orders issued by the Commanding General, Western Defense Command. All persons permitted to return to the West Coast areas by rescission of Individual Exclusion Orders shall be accorded the same treatment and allowed to enjoy the same privileges accorded law abiding American citizens or residents."

hered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe."

This proclamation referred to the alien enemies mentioned in Public Proclamations 2525, 2526 and 2527 (6 F.R. 6321, 6323 and 6324) of December 7 and 8, 1941; No. 2523 of December 29, 1941; No. 2537 of January 14, 1942 and No. 2563 of July 17, 1942, the alien enemies being foreign born nationals of Japan, Germany, Italy, Bulgaria, Hungary and Roumania. It did not apply to alien enemies who were friendly to us. It could never have had any application to citizens or to our native-born who might become and could become only mere "non-citizen" residents or "stateless" persons by a renunciation of citizenship privileges if renunciation constitutionally could have been effectuated.

On August 10, 1945, the Japanese Government sued for peace and surrendered on the general terms announced by the Allied Powers at the Potsdam Conference. On August 14, 1945, President Truman publicly announced Japan had made a full acceptance of the Potsdam Declaration, specifiying that Japan surrendered unconditionally, that hostilities had been ordered suspended and that he would make a proclamation of V-J Day upon the formal signing of the surrender. Thereafter, the President officially proclaimed September 2, 1945, to be V-J Day. General MacArthur and his troops have not encountered opposition from the Japanese since their surrender and our occupation of Japan. That vanquished nation has complied with

the terms imposed upon it by the victors and has cooperated with the policies laid down by General MacArthur.

During their detention by the Government at the Tule Lake Center 5,371 American born citizens of Japanese ancestry of the age of eighteen (18) years and upward, in early 1945, signed applications for renunciations of U. S. nationality. In eight (8) other like concentration camps a total of only 151 similarly situated and mistreated citizens signed like applications.[2]

Attention is drawn to the fact that when renunciation applications were signed at the Tule Lake Center the petitioners were faced with extraordinary conditions. They had been imprisoned for over three years without charges of any kind having been lodged against them. They had not been given any hearings of any kind whatsoever preserving the rudiments of due process of law. They had no expectancy of any immediate relief or of any release from their incarceration. Their imprisonment was not only of indefinite duration but it appeared that it might be perpetual. It was arbitrary, unreasonable and capricious. The communities from which they had been ruthlessly evacuated were hostile to their return. They feared they never would be restored to civilian life in this country but would be deported to Japan. They feared removal from the Tule Lake Center because of outside hostility to persons of Japanese ancestry. They were held in duress by the government although they were guiltless of wrongdoing. They were subjected to the intense pressure of the alien terrorists the government permitted to operate

[2]These are as follows: Central Utah, 9; Colorado River, 86; Gila River, 26; Granada, 12; Heart Mountain, 1; Manzanar, 8; Minidoka, 7; Rohwer, 2.

in that Center and against whom it gave them no protection whatever. Terror reigned against them from outside that Center and terror reigned against them inside that Center.

The United States Government owed these citizens the maximum amount of protection a government can give its citizens but it gave them no protection whatever. Having subjected them to a course of abusive treatment never visited upon any other group of citizens in our history it proceeded to abandon them utterly. While they were held in a grip of doubt, uncertainty, fear and terror it added the crowning insult to the injuries it already had inflicted upon them. The Department of Justice procured from Congress the passage of the renunciation statute, a special species of class legislation designed specifically for application to our citizens of Japanese ancestry. R. 160. It sent its agents post-haste to the Center to invite renunciations from the helpless internees. It solicited their renunciations while they were herded behind barbed wire fences and while armed guards patrolled the perimeter of the Center and loaded guns frowned upon the internees. It accepted renunciations from tormented persons engulfed in a mire of mass hysteria induced by the Government. It accepted renunciations from children and from persons who had been driven insane by the internment and the terror that ruled the camp.[3] It in-

[3]A total of 5,522 renunciations were obtained from Americans of Japanese ancestry. Children who were 14 and 15 years of age when first imprisoned and whose renunciations were approved when they were 18 are now adults. The Attorney General, aware of the injustice of their imprisonment, nevertheless approved their renunciations with full knowledge of their minority and of the duress in which they had been held for years.

vited the interned aliens to apply for repatriation to Japan and the citizens to apply upon a "repatriation" form for transportation to Japan.

At the time of the renunciations the Department of Justice did not contemplate involuntary removal. It led the internees to believe that only those who requested leave would be permitted to go to Japan. The Department then did not contemplate that any Japanese descended person would be expelled from this country and be deported to Japan against his will. Its acceptance of requests for transportation to Japan was kept upon a voluntary basis.

The relocation office in the Center had been closed for months by the W.R.A. and, in consequence, none of the internees were able to apply for relocation in the United States. R. 229, 255, 298 in No. 12251-2. The W.R.A. and not the Department of Justice was responsible for this action. The Department then did not contemplate indefinite detention and removal of the renunciants to Japan. The renunciants then were held in the custody of the W.R.A. and not of the Attorney General. Even the fact that the renunciants were to be detained was kept secret from them.[4]

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[4]In his letter of August 22, 1945, to Ernest Besig, director of the American Civil Liberties Union of Northern California, Edward J. Ennis, director of the Alien Enemy Control Unit of the Department of Justice, explains this secret policy as follows:

> "Individual renunciants have not been informed that they are to be detained because the War Relocation Authority, I believe correctly, feared that if it became generally known in War Relocation Authority Centers that every renunciant would be detained that might lead to a fresh wave of renunciations in other Centers by persons who were loyal to the United States but who, because of economic fears, were unwilling to

During the war period the Department of Justice neither intimated nor announced that it intended a forcible removal of any renunciant to Japan. Its removal policy first was decided upon and took shape after V-J Day. Having been trapped and coerced into renouncing while held under duress and caught in the grip of the terror that ruled in the Center and while laboring under fear of the community hostility that menaced them from the outside the renunciants suddenly were informed they were scheduled for removal to Japan.[5] Thereafter, out of the total number of renunciants, approximately 1,600 were transported to Japan either through fear, despair, resentment of their mistreatment or simply because they were obliged to accompany aged parents who were repatriated to Japan. Approximately 8,000 impoverished, disappointed and disillusioned persons have been transported to Japan, including aliens, their native born children and renunciants. All the alien leaders of the fanatical pressure groups which operated in the Center were removed to Japan as also were the few citizens who became active leaders. R. 169, 254, 266 in No. 12251-2.

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leave the Centers and who might renounce their citizenship as a means of insuring their continued detention in a camp. For this reason only such renunciants at Tule Lake as have indicated a desire to leave have been told that they were in detention * * *"

[5]The Newell-Star, the official publication of the Tule Lake Center, October 26, 1945, carried a letter of instruction to Mr. Best, Project Director, from Ivan Williams as the Officer in Charge for the Department of Justice notifying all renunciants of impending removal to Japan. The notification reads as follows:

"1. All persons whose applications to renounce citizenship have been approved by the Attorney General of the United States, will be repatriated to Japan, together with members of their families, whether citizens or aliens, who desire to accompany them."

When these proceedings were instituted below the Attorney General was detaining against their desire, as alien enemies for removal to Japan, approximately 5,500 native-born Americans of Japanese ancestry in the Tule Lake Center, California, and in internment camps at Bismarck, N. D., Santa Fe, N. M., and Crystal City, Texas.

The petitions for the writ were filed in the court below on November 13, 1945, on behalf of 987 petitioners then detained at the Tule Lake Center, Newell, Modoc County, California.[6] Thereafter, pursuant to various stipulations and court orders hundreds of additional petitioners were joined as parties petitioner in said proceedings. (See R. 205-6 and references to the unprinted record for names and dates of joinder.) As a result of the suits the removal proceedings were halted. Thereafter orders to show cause (R. 71) why they should not be removed from their native soil to Japan were issued by the Attorney General and each of them was subjected to an arbitrary administrative examination at which time each was deprived of the assistance of counsel. Before those so-called "mitigation"

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[6]In August, 1945, the WRA turned over the police squad room at Tule Lake to counsel for conferences with thousands of his interned clients. The seating facilities were some 36 packing boxes contining live rifle and revolver cartridges, 6 like boxes containing live tear gas bombs and 6 like boxes containing live hand grenades, all plainly labelled with their contents. A dozen rifles were stacked in one corner. After approximately 1,000 persons had been interviewed in groups of 200 counsel became aware of the discomfort of the interviewed and, inquiring, learned of their fears of possible accidental explosion from those sources. At counsel's insistence two Caucasian police were called in to remove the offending boxes and they, along with a number of the internees carted the boxes off to a room in the opposite end of the building. Had an explosion occurred and all of us been blown to kingdom come it doubtlessly would have been reported as an act of sabotage. It is somewhat amusing to reflect that citizens, branded dangerous alien enemies, carried off the munitions to a place of safety.

hearings on such orders to show cause were completed and when approximately 1,800 out of a total of some 4,200 had been held, the Attorney General, on February 12, 1946, published a list containing the names of 449 renunciants in Tule Lake Center who were given unfavorable recommendations following their hearings. Not one name was added to that unfavorable list from those who there later received their hearings. Those who received an unfavorable recommendation were selected arbitrarily from the first group of 1,800 examined. These were detained for detention and ultimate removal to Japan not on the basis of any such hearing but because they were classified either as being "kibei", which is to say nothing more than that they had received a measure of their education in Japan, or because their next of kin resided in Japan. The remaining 2,400 renunciants at Tule Lake were fortunate for they were released unconditionally whether or not they were classified as kibei or as having their next of kin in Japan.[8] The Attorney General held the 449 for removal to Japan under the provisions of Executive Proclamation No. 2655 which was promulgated under an ostensible authority of the Alien Enemy Act under the nebulous theory that by a simple renunciation of U.S. nationality they had become "alien enemies" within the purview of that Act.

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[8]The release was a belated demonstration that they never had constituted a threat to our security. The retention of 449 out of 5,537 at that late date for further detention and final removal to Japan was the result of caprice designed to lend a semblance of justification to the long series of governmental blunders and abusive treatment that caused the renunciations. It was nothing but a government face-saving measure.

Shortly after March 14, 1946, counsel for the parties hereto entered into a "Stipulation" (R. 94-95) under which the petitioners below not then released from custody were transferred from the Tule Lake Center in California to Santa Fe, New Mexico, Crystal City, Texas, and Bridgeton, New Jersey. Thereupon the Tule Lake Center was abandoned and, a short time later, the Santa Fe camp was closed out. Thereafter, prior to the award of the writs below all except 136 petitioners in proceeding No. 12195 and 2 in No. 12196 were granted outright releases from internment by the Attorney General.

On September 6, 1947, by a "Consent" (R. 196-197), the Attorney General released the 138 appellees then detained at Crystal City, Texas, and on "relaxed internment" at Seabrook Farms, Inc., Bridgeton, New Jersey, together with the 154 detained Nisei at said places who were not parties petitioner in the proceedings below, into the custody of their attorney whereupon all of said persons returned to their respective homes in the United States at government expense. Not one of the affected persons then was in the State of California. Thereupon the last of the wartime concentration camps maintained by the Government was closed. It is likely that by reason of the Supreme Court's decision in *Ahrens v. Clark*, 335 U.S. 160, which was decided on June 21, 1948, that this Court must affirm the final decision of the Court below if only for jurisdictional reasons.

It is a matter of public notoriety that none of the appellees either before or since their evacuation have been guilty of any acts presenting a clear and present danger to our government. The fact that the Attorney General

relaxed the internment of these renunciants and later released them to their attorney demonstrates that although he asserted them to be dangerous alien enemies his action demonstrated them to be harmless and proves that they did not menace our security. It is clear that the government, by the evacuation, imprisonment, renunciation and removal program, invaded the liberties of these persons and stripped them of all the rights, privileges and immunities that spring from national citizenship. Their constitutional rights and their rights under the Civil Rights Statutes were flouted, trampled upon and ignored by the Government as though they did not exist. The mistreatment exceeds the bounds of reason and is unprecedented in American history. If it is to be the forerunner of future deprivations of the rights of other minorities it is the harbinger of the decay of constitutional government.

SUMMARY OF ARGUMENT.

We contend that the unconstitutional treatment accorded the appellees during the war and since then has neither a legal nor a moral justification. We deny the validity of the renunciations, deny that the appellees are alien enemies and deny the applicability of the Act and Executive Proclamation to them. We contend that the renunciations are void for being the products of governmental duress and of the incidental private duress for which it was responsible; that the renunciation statute is special discriminatory class legislation and is invalid and unconstitutional on its face and as applied to them; that the Alien Enemy Act never has had application to them and that it is not

a self-perpetuating statute but, on the contrary, automatically ceased to apply even to alien enemies within a reasonable period of time after the cessation of hostilities with Japan.

In the following pages we do not address ourselves to the invalidity of the renunciations as the result of duress but reserve this question for discussion in our brief on appeal in the consolidated suits in equity brought to rescind the renunciations. Herein we shall limit ourselves to an attack upon the application and constitutionality of the renunciation statute, the validity of the nationality regulations and the detention and threatened removal of the appellees upon the ground that even if the renunciations were to be deemed valid the appellees do not fall within the category of "alien enemies" as defined in the Alien Enemy Act and that, in consequence, Executive Proclamation No. 2655 cannot be applied to them. Consequently, we maintain that the appellees were unlawfully detained and are not subject to removal to Japan.

The pleadings admit that each of the appellees is of Japanese ancestry. The admission of par. II of the answer to the amended petition (R. 134) that each is a "person of Japanese ancestry, a native, domiciliary of the United States, and a resident of the Northern District of California" and the admission in par. III thereof (R. 135) that each was detained by respondent for removal purposes, aside from any evidentiary proof, are sufficient to reveal that the Alien Enemy Act has no application to them and that their detention was absolutely unlawful as a matter of law as also is their threatened removal to Japan.

ARGUMENT.

I.

THE RENUNCIATION STATUTE IS VOID FOR DENYING EQUALITY AS AN ELEMENT OF THE DUE PROCESS GUARANTY OF THE 5TH AMENDMENT.

The legislative history of the renunciation statute, 8 USCA, Sec. 801(i), shows that it was enacted for the express purpose of procuring the renunciations of Nisei held in our concentration camps. (R. 155-161.) It was intended to apply to them and was applied to them to the exclusion of other types of citizens. Inasmuch as it was an unjust discrimination against them, "applied and administered by public authority with an evil eye and an unequal hand" it is void as a denial of the equal protection of the law which is implicit in the due process guaranty of the 5th Amendment. See *Yick Wo v. Hopkins,* 118 U.S. 356; *Ah Sin v. Whitman,* 198 U.S. 500, 507-8; and *Sims v. Rives* (CCA-DC), 84 Fed. 2d 871, cert. den. 298 U.S. 682.

II.

A RESIDENT NATIVE BORN RENUNCIANT IS NEITHER DETAINABLE NOR REMOVABLE UNDER THE ALIEN ENEMY ACT.

Renunciation.

From the standpoint of statutory construction, without touching upon the constitutionality of the matter, a renunciation of U.S. nationality is neither a criminal nor a tortious act. It has not been made illegal or punishable by Congress. On the contrary, it has been specifically designated a lawful act by Congress in Title 8 USCA,

Sec. 801 (i).[9] Neither that section nor any statute authorizes the expulsion, banishment or removal from the United States of a person who renounces. By renunciation under this statute, provided it be constitutional which we deny, a native born renunciant merely would relinquish his national status of citizenship. His political status would change from that of a "citizen" to that of a "non-citizen". Although he thereby would become detached from the government he would remain attached to this country, his native soil, and thereafter hold a status similar to that formerly held by American Indians, the aborigines of this land who, until recently, were considered non-citizen residents of this country but subject to our jurisdiction. He would not become an alien for an alien is defined to be a person born outside the United States who has not become a naturalized citizen. *Low Wah Suey v. Backus*, 225 U.S. 460, 473.

The losses a resident renunciant would suffer, if renunciation were constitutional, would be those which result from the loss of nationality status, i.e., he would surrender only the political privileges that are peculiar to citizenship. He would yield his right to hold public office and his right to vote. He would waive his right to participate in the government of the nation but remain subject to its jurisdiction. Despite the fact that he would divest himself of citizenship rights the government still would extend certain rights to him. He would be protected in

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[9]This statute is the first congressional expression in our history which attempts to authorize the renunciation of nationality by a resident citizen. Prior to its enactment expatriation and also renunciation abroad were recognized legal rights but renunciation of a resident citizen was not authorized.

the exercise of those "inalienable" civil rights which the Constitution guarantees him as a "person" under the 5th and 14th Amendments. If resident aliens have constitutional rights which even Congress may not ignore in its plenary power of deportation as declared in *Truax v. Raich,* 239 U.S. 33, *Bridges v. California,* 314 U.S. 252, and in the concurring opinion of *Bridges v. Wixon,* 326 U.S. 135, 161, it follows that the similar rights guaranteed to resident native-born subjects or non-citizens cannot be ignored. It long has been settled that the existence of a state of war does not suspend the provisions of the 5th Amendment. *U. S. v. L. Cohen Grocery Co.,* 255 U.S. 81.

A simple renunciation of nationality by a native-born resident which was not followed by expatriation could not transform him into a foreigner, an alien or a stranger. It could not clothe him with a foreign nationality or deliver him into the jurisdiction of a foreign power. He would remain a native of this country in which he has his residence and domicile. If renunciation were constitutional he would become "stateless" but would remain a subject of our government. Although he would forfeit his political privileges he still would be an inhabitant of this country and so long as he resided within our boundaries he would be subject to the jurisdiction of our government. He could not acquire foreign allegiance or citizenship so long as he remained within our geographical limits. No foreign power could claim his allegiance or acquire jurisdiction over him while he remained on his native soil.

A simple renunciation, if constitutional, would deprive a person of his substantive right of national citizenship

and of the adjective right to assert it in our forums but it is doubtful that it would deprive him of state citizenship. We maintain, however, that national citizenship is a substantive status which, once gained, persists and cannot be lost in the absence of constitutional authorization prescribing grounds for forfeiture although the adjective right to assert it may be waived under certain conditions hereinafter discussed.

Expatriation.

A citizen by birth or by naturalization can relinquish his nationality only by one or more of the methods prescribed by Congress in Title 8 USCA, sec. 801. No other methods have been set up for (1) relinquishment of U.S. nationality or (2) for expatriation.

By abandoning his U.S. residence and domicile, voluntarily departing from this country and acquiring a foreign residence and domicile and then becoming naturalized in a foreign country he becomes an *expatriate* and occupies the status of an alien. By expatriation he surrenders his right to return to this country except on the same basis as an alien complying with our immigration laws. *Reynolds v. Haskins* (CCA-8), 8 Fed. 2d 473; *McCampbell v. McCampbell* (DC-Ky.), 13 Fed Supp. 847; 11 *C.J.* 784 and note 14. Consequently, any American who leaves our geographical jurisdiction and becomes an expatriate is barred from returning here except by complying with our immigration laws. See 14 *C.J.S.* 1149, sec. 17 and cases there cited. If such a person did not become naturalized in the foreign state he would be a "stateless" person there.

Foreign residence in and of itself does not convert a person into a citizen of another country. Naturalization in the foreign state first must be authorized by that state and be acquired by the applicant. See *Savorgnan v. U.S.*, 94 L. Ed. Adv. Ops. 203; *Elk v. Wilkin,* 112 U.S. 94. In time of peace the consent of our own government is not necessary for one of our citizens to expatriate himself but the consent of the foreign sovereign is necessary for him to acquire its nationality. *Jennes v. Landes* (CC-Wash.), 84 Fed. 73. Foreign nationality is acquirable only by a formal naturalization in a foreign state (8 USCA, sec. 801 (a)) after U.S. nationality first has been surrendered in the foreign state to a U.S. diplomatic or consular officer pursuant to the provisions of Title 8 USCA, sec. 801 (f). Such a foreign naturalization must be based upon the mutual consent of the applicant and the foreign government. If he did not become naturalized formally in a foreign state but that state, nevertheless, tolerated his presence within its territory such a person would be deemed to be a "stateless" person by its and our law. Whether or not he became a "stateless" person or actually an expatriate by naturalization in a foreign state he could resume U.S. citizenship by compliance with the provisions of our naturalization laws as hereinafter explained.

The right of expatriation is inherent if the method pursued is one of those prescribed by the expatriation statute. *U.S. ex rel. Scimeca v. Husband* (CCA-2), 6 Fed. 2d 957. It is to be observed that expatriation must be *voluntary* to operate as a bar to an assertion of U.S. citizenship. Even involuntary service in the military

forces of a foreign power does not deprive a person of his right to assert his citizenship. See *Ishikawa v. Acheson* (DC Hawaii, Aug. 12, 1949), 85 Fed. Supp. 1; *U.S. ex rel. Francassi v. Karnuth* (DC) (NY), 19 Fed. Supp. 581; *Fish v. Stoughton* (NY), 2 Johns Cas. 407; *Browne v. Dexter,* 66 Cal. 39; and rules, 14 *C.J.S.* 1144, sec. 15. However, voluntary service in the armed forces of a foreign power following an acquisition of its nationality is an act of expatriation under the provisions of Title 8 USCA, sec. 801. None of the appellees herein has lost his nationality through any of the means therein set forth unless it be through the renunciation sought to be authorized by sec. 801 (i) therein.

The right to assert national citizenship, however, may be barred by voluntary departure from this country, the acquisition of a *foreign residence and domicile* and also when these steps are followed by *naturalization* in a foreign country. Such a combination of successive steps is called "expatriation" by which a person becomes a "stateless" person or a "foreigner" or an "alien". (See 8 USCA, sec. 803a.) By simple *renunciation,* however, a resident native-born citizen does not become an alien but a *stateless* person. The right of a person to remain stateless at his own election is recognized. See *U.S. ex rel. Schwarzkopf v. Uhl* (CCA-2), 137 Fed. 2d 898, 902.

An expatriate abandons whereas a resident renunciant retains his United States residence and domicile.

For expatriation to be effective and to deprive one of the right of residence and domicile in this country it must be made *voluntarily (Hardy v. DeLeon,* 6 Tex. 211, at

pp. 106, 117-119; *State ex rel. Phelps v. Jackson* (1907), 79 Vt. 504, 65 A. 657, 8 LRANS 1245), by a person of the *full age* of twenty-one (21) years and not laboring under any legal disability *(McCampbell v. McCampbell* (DC-Ky. 1936), 13 Fed. Supp. 847; *State v. Jackson,* supra; *U.S. ex rel. Rojak v. Marshall* (DC-Pa.), 1929, 34 Fed. 2d 219, 220; 11 *C.J.* 784, note 14), as the result of a fixed determination to change his domicile, followed by a voluntary departure from this country *(Rojak case,* supra), and the acquisition of a foreign citizenship and allegiance. See also, 14 *C.J.S.* 1143, sec. 15, for summary and citations. In 11 *C.J.* 784 the rule is stated as follows:

> "In order that expatriation may be considered to have taken place there must be an actual removal from the country of which the individual is then a citizen or subject, made voluntarily by a person of full age, and under no disability as the result of a fixed determination to change his domicile, as well as to throw off the former allegiance and become a citizen or subject of a foreign power."

Attention is drawn to the fact that *simple expatriation* is based upon an actual abandonment of U.S. residence and domicile and the acquisition of a foreign residence and domicile while *full expatriation* contemplates the additional factor of a formal naturalization in the foreign state by which a person voluntarily gives that foreign state his complete and undivided allegiance. Mere *renunciation* of nationality within the U.S. does not disturb one's U.S. residence and domicile. Consequently, a resident citizen cannot become an expatriate by simple renunciation. Obviously, infants and insane persons whose re-

nunciations were accepted by the Attorney General were not *sui juris* and, consequently, could not become expatriates or renunciants. See *McCampbell v. McCampbell* (DC-Ky. 1936), 13 Fed. Supp. 847; also *Perkins v. Elg,* 307 U.S. 325, and *Haaland v. Attorney General* (DC-Md.), 42 Fed. Supp. 13.

A simple renunciation of nationality does not justify removal under the Alien Enemy Act.

Simple renunciation does not justify the application of the Alien Enemy Act to a native-born resident. The Act justifies the detention and removal of "alien enemies" and of no other persons whomsoever. It authorizes a presidential restraint only upon "natives, citizens, denizens or subjects of the hostile nation or government". 50 USCA, sec. 21. The word "natives" refers to the place of one's nativity. *U.S. ex rel. D'Esquiva v. Uhl* (CCA-NY 1943), 137 Fed. 2d 903. Nativity, under sec. 20, is determined solely by the place of birth. *U.S. ex rel. Umecker v. McCoy* (DC-ND, 1944), 54 Fed. Supp. 679, appeal dism. 144 Fed. 2d 354. The word "denizens" refers to foreigners in our country who have become naturalized citizens of another country. See *U.S. ex rel. Zdunic v. Uhl* (CCA-NY, 1943), 137 Fed. 2d 858. It refers to foreigners temporarily in our midst who were born in one foreign country but are domiciled in another where they obtained *ex donatione regis* letters patent making them subjects of that country. See 1 *Cooley's Blackstone,* p. 317, sec. 375. In short, citizenship conferred by a parliament or other legislative body is termed naturalization while that conferred by the crown or executive body is

termed denization. The word "subjects" is generic for all types of foreigners in our midst who are domiciled in a foreign country whether they are native citizens, denizens or aborigines of that foreign country or of territory subject to its temporal jurisdiction although its authority is not enforceable when they are outside its boundaries.

If a resident renunciant were to be deported to Japan under protest and under duress it would not be in the capacity of a native, citizen, denizen, or subject of Japan but as an involuntary deportee who is a native, subject and domiciliary of the United States. In Japan he would be accepted only because Japan as a conquered country couldn't refuse him admission but the deportee there would be viewed as a stateless person or as an outcast.

III.

DUAL CITIZENSHIP IS A MYTH.

It is impossible for a resident American citizen to have "dual citizenship", that is, American citizenship while at the same time holding foreign citizenship. In Title 8 USCA, sec. 800 (formerly Title 8 USCA, sec. 15) Congress has expressly *disavowed* the claims of foreign governments to the allegiance of emigrants to this country who have expatriated themselves from foreign lands and has expressly *disavowed* the claims of foreign governments to the allegiance of the native-born descendants of emigrants to our shores, in the following language:

> "* * * and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore any declaration, instruction, opinion, * * * which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

By this congressional disavowal any claims foreign governments might make to the allegiance of our citizens are repudiated as being *"inconsistent with the fundamental principles of the Republic"*. As a matter of law, therefore, no resident American citizen has and none can owe any allegiance to any foreign power and none holds and none can hold foreign citizenship or the fictitious political status of a dual citizen. A dual political status is contrary to sovereignty itself and hence unconstitutional. Having a single nationality a resident citizen could relinquish that nationality by renunciation executed under Title 8 USCA, sec. 801 (i), if such were constitutional, without acquiring another nationality. Thereafter, he could expatriate himself but only in *peacetime* and then only by departing voluntarily from this country and taking up "a residence abroad" (Title 8 USCA, sec. 803a) where he would become a "stateless" expatriate unless he became naturalized in the foreign state.

The congressional rejection of the claims of foreign governments to the allegiance of and jurisdiction over our citizens contained in Title 8 USCA, sec. 800, is a legislative declaration of constitutional policy and an announcement of an unalterable inherent principle of sovereignty. Neither by constitutional declaration, treaty nor statute has the United States at any time authorized, conceded or recognized any extraterritorial claim or right of Japan or any foreign power over any of our resident citizens or over any alien residing in the United States. On the contrary, Sec. 800 is an express repudiation of any such extraterritoriality. It is a denial absolute of the fictitious status of dual citizenship. The sole jurisdiction that Japan could have exercised over any person on American soil necessarily would have been restricted to her own authorized diplomatic and consular officers and agents pursuant to treaty provisions or international comity. The exception of those officers, pursuant to international law, proves that her jurisdiction could not extend over any other persons whomsoever. Her extraterritorial jurisdiction would reach such officers but could neither encompass nor affect alien Japanese residing here and could not, in any wise, affect U.S. citizens here regardless of Japanese law. The dual citizenship charge on which the appellant appears to rely has not even the prestige of a legal fiction. It is a legally impossible status. It is absurd for the appellant to resort to such a fictitious theory in a vain attempt to justify the outrages already committed against the appellees by the Administration which for eight long and weary years has acted oppressively against them in the name of the Government.

No issue of dual citizenship is involved.

Paragraph II of the amended petition for the writ of habeas corpus (R. 99) alleges each petitioner to be a native-born resident and domiciliary of the United States. Par. II of the answer thereto (R. 134) admits those allegations, viz., that each is a "person of Japanese ancestry, a native, domiciliary of the United States" and par. II thereof also alleges that each, by renunciation, is an "alien and a citizen and subject of Japan". This latter contention of the appellant is based upon the theory that a few of the petitioners below might have possessed dual nationality at the time of their renunciations according to Japanese law and that on the claimed loss of U.S. nationality they automatically became citizens of Japan although they were physically in the United States. Suffice to state that no evidence of any character whatever was adduced by the appellant to support any such contention.[10]

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[10]In an affidavit of Thomas M. Cooley, II (then one of the attorneys for the respondent below), dated November 7, 1946, and filed November 12, 1946 (as an appendix to respondent's points and authorities (not printed)), and in his affidavit dated January 9, 1947, included in his supplemental brief filed therein on January 27, 1947, and in the letter from GHQ dated 25 November, 1946, attached to his affidavit dated January 6, 1947, included in that supplemental brief, reference was made to what purported to be nothing except hearsay opinions concerning Japanese nationality laws. Those references clearly were inadmissible as evidence for the various reasons specified in the objections and exceptions thereto and motions to strike and suppress the same (R. 164, 170) filed by petitioners below on December 18, 1946, and January 29, 1947, which, along with the causes were submitted to the court below for decision on the motions for summary judgment and on the pleadings by the mutual consent of the parties so as to secure a final disposition of the habeas corpus proceedings without resorting to thousands of individual hearings. Suffice to state that no evidence whatever of the application of any foreign law to any of the appellees was offered by the respondent below.

There is not an iota of evidence in the record submitted to the court below that any of the appellees at any time whatever possessed dual citizenship. The only reference made to any such matter is that contained in the affidavit of Mr. Burling (R. 159 in No. 12251) stating that it was a *belief* in the Department of Justice that Japanese law provided that a citizen born in the United States of Japanese parents prior to December 1, 1924, automatically acquired and held Japanese citizenship unless he affirmatively divested himself of it and that a citizen of such parentage born since said time *might acquire* Japanese citizenship by being registered (within 2 weeks of his birth) by his father with a Japanese consular official.

Neither the jus sanguinis principle nor registration law of Japan establishes dual nationality of a resident citizen.

The fiction of "dual citizenship" cropped into an undeserved prominence in General DeWitt's incredible "Final Report" where this term was employed as an unjustifiable excuse for the brutal evacuation from the Western States of a whole segment of our citizenry upon a discriminatory ancestral basis. That general to the contrary notwithstanding there is no such thing as an American citizen possessing dual citizenship. Since December 1, 1924, there has been such a practice as the registration of infants within a period of two weeks from their births at Japanese consulates by a number of alien parents of native-born Americans of Japanese lineage. Thereafter an entry of such births is made in the "Koseki", a municipal register maintained at the alien father's ancestral home in Japan. By this type of registration

alien parents may have imagined their children would be entitled to exercise rights in Japan if thereafter they were to acquire residence there. A child two weeks of age, however, is not *sui juris* and could not prevent such a registration. A parent can neither confer nor destroy a child's citizenship status. Consequently, such a registration does not bind an infant and has no legal significance. An infant does not have to disclaim such a registration. Congress already has repudiated the act and disavowed the claims of foreign governments to the allegiance of our native-born in Title 8 USCA, sec. 800.

Citizenship in many European and Asiatic countries depends upon the *jus sanguinis,* as witness Germany, France, Italy, Switzerland, Turkey, Bulgaria, Japan and other foreign governments. It makes little difference that some countries following the *jus sanguinis* might assert that nonresident descendants of their citizens automatically become citizens subject to their jurisdiction or that they are entitled to such citizenship wherever they might reside. At most, it is nothing but an offer or invitation to exercise privileges held out to foreign descendants of their own citizens. No American citizen can accept such an offer or invitation while within our jurisdiction. Congress expressly has repudiated such a status, offer and claim of foreign governments. Citizenship in the United States depends entirely upon the *jus soli* as announced in the 14th Amendment and not upon the *jus sanguinis.*

Under its sabre-rattling Third Reich, Nazi Germany did not confer its citizenship under the *jus sanguinis.* It went farther. It claimed that all persons of German ancestry,

wherever situated, owed it allegiance. Japan, however, never entertained like pretentious claims. Up to December 1, 1924, it offered foreigners of Japanese ancestry (Nisei, Sansei, etc.) a right to formal naturalization under the *jus sanguinis* if and when they acquired residence in Japan.[11] It made a like offer to such foreigners born since December 1, 1924, if their births first had been registered in their ancestral family Koseki.[12] It never claimed, however, that non-residents who were citizens of other countries were naturalizable or owed it any allegiance.

A number of alien Japanese parents of American citizens have registered their infants' births under an erroneous belief that they were obliged so to do to satisfy a duty laid upon them by Japanese law but the registration

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[11]The Nationality Act of Japan, Stat. No. 66 of March 16, 1899, as revised by Stat. No. 27 of 1916 and Stat. No. 19 of 1924 (Genro Horei Shuren, pp. 929-930), provides as follows:

> Art. I. A child is regarded as a Japanese if its father is at the time of its birth a Japanese * * *
>
> Art. 20, Sec. 2. A Japanese who, by reason of having been born in a foreign country designated by Imperial Ordinance, has acquired the nationality of that country, and who does not as laid down by order express his intention of retaining (Japanese) nationality, loses his Japanese nationality retroactively from his birth.
>
> (By Imperial Ordinance No. 262, Official Gazette, 17 Nov. 1924, the United States of America was designated a foreign country under Art. 20, Sec. 2.)

[12]Since December 1, 1924, under Article 2 of the Japanese Nationality Enforcement Regulations, it is provided that Japanese nationality of a foreign born child of Japanese nationals cannot be retained unless the birth of such child is reported by the father to a Japanese embassy or consular officer under Article 72 of the Family Registration Act and the name of such child thereafter is registered in the father's "koseki", a municipal family registry record of the father's ancestral line. See, 14 *Genro Hori Shuren*, page 952.

was of no significance. It did not and could not create an allegiance to Japan on the part of the infant citizens of the United States which expressly has been repudiated and disavowed by Congress as being "inconsistent with the fundamental principles of the Republic". It could not convert an American child into a native, citizen, denizen or subject of Japan. There is neither a legal nor a moral duty incumbent upon a native-born American to divest himself of such a registration. Why should he disavow a registration of which he could have no personal recollection and which he could not have prevented and which could not bind him? Why should he notify a foreign government that he does not recognize it and that the United States does not recognize it and then take the time and trouble and incur an unnecessary expense to cancel a registration made by a parent without his knowledge and consent by resort to litigation nowhere authorized or recognized by our law?

It is significant that, although there was no duty incumbent upon them so to do, Japanese descended citizens of this country have done more to shake off the implications of a registration they never solicited than have citizens of European stock. No one, however, ever heard of our citizens of German, French, Italian, Turkish, Bulgarian and Swiss stock taking any legal steps to shake off the implications of such a registration. Why, then, should our citizens of Japanese stock? Such a registration does not create dual citizenship and allegiance. It does not create disloyalty or hostility to this nation. If we are to suspect citizens of disloyalty simply because their births

were registered with a foreign government by parents or relatives when they were swaddling infants we would have had to suspect all German, French, Italian, Swiss, etc. descended citizens of disloyalty. We would also have to entertain serious doubts about the loyalty of all our citizens because all of us are descended from foreign stock. Even the Indians must be suspect for they appear to be descendants of Mongolians. We conclude that all that the silly suspicion against our citizens of Japanese ancestry which arises out of the fictitious charge of dual citizenship proves is that there is not only a want of logic but a lot of juvenility and nonsense in prejudiced minds.

National and state citizenship.

In the United States a "double citizenship" exists, under the 14th Amendment, as to each resident who is a citizen by birth or by naturalization. These are: (1) membership in the nation as a whole from which a person derives nationality and (2) membership in a State in which he resides, as provided by the laws of the respective States. Americans residing within a State are subject to two governments, one national and the other the State. They owe allegiance and obedience to the laws of both sovereigns and in return are entitled to demand and receive protection from each. See 14 *C.J.S.* 1131, sec. 2, and cases there cited.

A simple renunciation of national citizenship, if possible and valid, would not automatically deprive a resident renunciant of State citizenship in the absence of a

State statute so providing. It could not render the renunciant subject to removal by the federal government because that would constitute an invasion of the rights of the States, depriving the States of their citizens and of the allegiance of those citizens. It would contravene the provisions of the 9th and 10th Amendments also. The federal government may not rightfully interfere with the sovereignty of the States and, consequently, cannot impair State citizenship. One might be barred, however, from asserting his substantive right to both by expatriation.

IV.

NEITHER RENUNCIATION NOR EXPATRIATION CAUSES IRREVOCABLE LOSS OF CITIZENSHIP.

The 14th Amendment makes "all persons born—in the United States—citizens of the United States and of the State wherein they reside". Obviously, citizenship, a substantive status granted and guaranteed by the Constitution, cannot be destroyed by Congress, the Executive or the Judiciary. Sec. 8, subd. 4 of Art. I of the Constitution empowers Congress "to establish an uniform Rule of Naturalization" but no like power is conferred upon that body to establish a rule, uniform or otherwise, whereby the substantive right of citizenship granted by the 14th Amendment may be taken away. The grant creating national citizenship is of a constitutional dignity equal to that of the creation of the divisions of government and can no more be legislated away than Congress could legislate itself out of existence. Citizenship is the substance and

fibre of the Constitution. What Congress may not take away the Attorney General may not take away.

Simple expatriation merely bars adjective right to assert but does not destroy substantive citizenship.

Congress is empowered, however, to prescribe what act or acts shall constitute the expatriation of a person and his forfeiture of our protection aboard as well as to prescribe the requisites for a resumption of citizenship rights by an expatriate. See 14 *C.J.S.* 1142, sec. 15. See also Title 8 USCA, sec. 372, now repealed, and replaced by Sec. 701(d). The bar raised by Congress in this respect, however, is a procedural or adjective one in the nature of a rule of evidence which does not destroy but leaves intact the substantive right of citizenship. The bar is in the nature of a procedural estoppel precluding the expatriate from asserting his substantive right of citizenship in a proper forum unless he first pursues the procedural method Congress has set up in the Nationality Act of 1940 to enable an expatriate to resume citizenship rights. Since the repeal of Sec. 372(a) expatriates must follow the procedure required of aliens generally. Formerly, until the adoption of that Act, an expatriate was permitted to resume citizenship through the medium of a simplified procedure authorized by Sec. 372(a).

In effect, expatriation is a suspension but not a destruction of citizenship. The expatriate is barred from asserting his American nationality in our forums until, after complying with our immigration and naturalization laws, he is authorized to assert his citizenship. See 14 *C.J.S.* 1142, sec. 15. Thus it has been held that, in the absence of

any statutory provision to the contrary, a citizen of the United States who is domiciled therein remains such notwithstanding he has taken an oath of allegiance to a foreign country. *Fish v. Stoughton* (NY), 2 Johns Cas. 407. In general, however, the taking of such an oath, when coupled with a change of domicile, is sufficient to raise the bar. *Browne v. Dexter,* 66 Cal. 39, 4 Pac. 913; 14 *C.J.S.* 1144, sec. 15.

An expatriate can resume American citizenship privileges only upon statutory terms laid down by Congress in our naturalization laws which are procedural or adjective ones. *Reynolds v. Haskins* (CCA-Kans.), 8 Fed.2d 473; *Chacun v. Eighty-Nine Bales of Cochineal* (CCA-Va.), 5 Fed. Cas. No. 2568, 1 Brock 478, affirmed, 7 Wheat. 283, 5 L. Ed. 454. Congress could forbid expatriation and, upon apprehension, subject the expatriate to criminal penalties for violation of its mandate.

Inasmuch as an expatriate may resume citizenship it must be assumed that if renunciation were legally possible a renunciant who had never departed from his native soil also could resume citizenship upon compliance with our naturalization laws. Were the renunciation of a resident citizen to be deemed constitutional the act of renunciation would not destroy the substantive right of citizenship but would suspend it. The renunciant would be entitled to resume citizenship upon compliance with the naturalization laws if he were deemed "racially" eligible to naturalization. However, the renunciation statute, Title 8 USCA, sec. 801(i), authorizes acts contrary to sovereignty and destructive to the citizenship conferred by the

14th Amendment and, in consequence, is unconstitutional and void on its face.

The Constitution grants citizenship absolutely and without qualification to the native-born. The expatriation laws can be justified only on the theory that they set up a temporary bar to the exercise of citizenship rights which the individual can remove. Otherwise they would be unconstitutional. Here, however, the appellees, by virtue of being of Japanese lineage and hence of a so-called race ineligible to citizenship would have no method of regaining citizenship rights if their renunciations were deemed valid because the naturalization laws would preclude a recovery of citizenship rights. Consequently, in so far as Title 8 USCA, sec. 801(i), attempts to make loss of citizenship rights irrevocable, it is unconstitutional.

V.

EXPATRIATION AND REMOVAL TO AN ENEMY COUNTRY WHILE A STATE OF WAR EXISTS ARE FORBIDDEN AS BEING TREASONABLE.

The rule at common law was that a citizen or subject was forbidden to expatriate himself without the express consent of his sovereign. *Shanks v. Dupont* (SC), 3 Pet. 242, 7 L.Ed. 666; 14 *C.J.S.* 1142, sec. 14. Our Courts early questioned the wisdom of that rule (*Reynolds v. Haskins* (CCA-Kans.), 8 Fed. 2d 472) with the result that expatriation now is recognized as a natural and inherent right but exercisable only during peacetime. See Title 8 USCA, secs. 801-807 and 800. Under the provisions of Title 8, USCA, sec. 16 (Act of March 2, 1907, 34 Stat. at Large,

p. 1128, c. 2534) an American citizen could not expatriate himself when the country was at war. *In re Bishop* (DC-NY), 26 Fed. 2d 148; *In re Grant* (DC-Cal.), 289 Fed. 814; and 14 *C.J.S.* 1142, sec. 14. That section, however, was repealed by the Act of October 14, 1940, c. 876, Title 1, subchp. V, sec. 504, 54 Stat. 1172, and was not reenacted in the Nationality Act of 1940. Upon its repeal, however, the common law rule forbidding expatriation during wartime was revived. The common law federal rule, which is an underlying part of the Constitution itself, is that neither the renunciation nor the expatriation of citizens is permissible during wartime. In addition, in Title 22 USCA, sec. 223, Congress has authorized the President to forbid any person from entering or leaving the country during wartime. As hereinafter argued, if a state of war still exists, expatriation to Japan or removal thereto under the Alien Enemy Act likewise would be unlawful, both types of departure being prohibited as acts of treason. On the other hand, if the state of war has terminated expatriation has become permissible but the Alien Enemy Act has expired and removal thereunder has become unlawful.

If a citizen or subject of the United States cannot depart from this country and take up residence in an enemy country during the existence of a state of war he cannot become an expatriate. Likewise neither a citizen nor a resident renunciant can be removed to an enemy country while a state of war exists. In either type of departure the aim would be either a voluntary or an involuntary departure from this country and the consequent loss or evasion of the performance of obligations to this country

and the likelihood of such a person bearing arms against us after his arrival in enemy territory. Consequently, expatriation and forcible expulsion and removal to enemy territory under the Alien Enemy Act while a state of declared war exists are forbidden as being contrary to the sovereignty of this nation and as being treasonable under Sec. 3 of Art. III of the Constitution. Even the repatriation of an enemy national would be forbidden as an act of treason unless he were exchanged for a prisoner of war. However, if the right of expatriation has been revived by the cessation of war the power of the Attorney General to remove anyone under the Act has terminated. That Act, however, has never had proper application to a resident renunciant who, by renunciation, could become only a resident noncitizen, subject or stateless person if the renunciation was constitutional and valid.

Obviously, any statute which might be enacted (and there is none now existent) which would authorize the departure or removal of a citizen, subject or resident to a belligerent country with which this country officially was at war would contravene the provisions of Sec. 3 of Art. III of the Constitution inasmuch as it would authorize a supply to the enemy of soldiers who could take up arms against us and of workers who could aid the enemy cause. Such is prohibited as levying war against us and as authorizing adherence to our enemies, giving them aid and comfort. It is possible, therefore, were we to concede the constitutionality and legality of renunciation, that Congress, without infringing on the constitutional prohibition against treason, could authorize simple renunciation dur-

ing war time but could not authorize expatriation, removal or departure to a hostile country during wartime.

Congress declares, in Title 8 USCA, sec. 601(a) that persons "born in the United States and subject to the jurisdiction thereof" shall be "nationals and citizens of the United States at birth". The statute implements the 14th Amendment. Congress could repeal this statute but such a repeal would not impair the grant of the 14th Amendment.

It is extremely doubtful that Congress could authorize renunciation of U.S. citizenship at any time when it is considered that our national survival is dependent upon the unimpaired maintenance of the citizenship status. If it cannot whittle away the Constitution it follows that it cannot deprive the Constitution of the citizens which constitute its support. We do not believe that it can authorize the renunciation of citizenship or the expulsion of citizens of this nation and thereby destroy not only the grant of the 14th Amendment but impair the foundation of the Constitution itself. It may authorize punishment for citizens guilty of infractions of law and may set up procedural bars against the assertion of citizenship but may not destroy the substantive citizenship status. In consequence, we conclude the renunciation statute to be void for being repugnant to the Constitution.

VI.

IF RENUNCIATION IN WAR TIME IS CRIMINAL THE GOVERNMENT WAS PARTICEPS CRIMINIS AND WAS GUILTY OF ENTRAPMENT WHICH WOULD RELIEVE RENUNCIANTS FROM PUNISHMENT IN ANY FORM.

If the Attorney General contends that renunciation of nationality, whether or not it was followed by a request to depart from the country, was criminal or quasi-criminal in nature and subjected them to removal to a foreign land for such a reason, we direct attention to the fact that the legal significance of the act was unknown to the renunciants and the intent of the Attorney General to deport them was concealed from them until after the war had ended.[13]

Inasmuch as the Attorney General takes the view that a citizen was transformed by renunciation into an alien

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[13]The letters from the Assistant Attorney General Herbert Wechsler notifying many of the petitioners that their renunciations were accepted did not inform them that the Government viewed them as alien enemies and that it intended to remove them to Japan. The letters indicate the official view was that the renunciants no longer were citizens and that they had become stateless. Those letters read as follows:

> "You are hereby notified that, pursuant to Sec. 401(i) of the Nationality Act of 1940, as Amended, and the regulations issued pursuant thereto, your renunciation of United States nationality has been approved as not being contrary to the interests of national defense. Accordingly you are no longer a citizen of the United States of America nor are you entitled to any of the rights and privileges of such citizenship."

Although hundreds of the internees sent letters to the Attorney General rescinding their applications for renunciation long before they received notice of approval his office recklessly disregarded their letters and insisted on accepting renunciations even though they had been cancelled. His office sent out hundreds of such notices to petitioners after these proceedings had been initiated and addressed many of them to the Tule Lake Center months after it had been closed out and the renunciants had returned to their homes.

enemy and that it constituted a form of adherence to the enemy we direct attention to the fact that the Government itself, through the instrumentality of the Attorney General's office, induced the renunciations and, in consequence, the action of the government was treasonable and constituted an "entrapment" which rendered the government's actions void and the petitioners' actions unpunishable. See *Woo Wai v. U. S.* (CCA-9), 223 Fed. 412. The renunciation statute, therefore, as applied to the appellees, is unconstitutional and void for authorizing adherence to the enemy, and, in consequence, of treason in violation of Sec. 3 of Art. III of the Constitution.

VII.

ALIEN ENEMY ACT HAS NO APPLICATION TO APPELLEES.

The Alien Enemy Act is an emergency war measure designed to insure the public safety. It empowers the President to restrain the activities of alien enemies during the period of hostilities. It is invoked by a presidential proclamation. It terminates when the hostilities which called it into operation cease or within a reasonable period of time thereafter when the public safety is secured or when peace is declared to have been restored either by presidential proclamation or by a declaration of Congress. The restraint which it authorizes against alien enemies takes two forms, (1) the detention and removal of hostile alien enemies, Sec. 21, and (2) the removal of alien enemies not charged with actual hostility, Sec. 22. Detention effectively prevents the commission of hostile acts against us and thereby insures the public safety.

Removal to Japan while a state of war exists is forbidden as an act of treason for giving aid and confort to the enemy.

The Act was not designed to authorize hostile alien enemies to be removed to a belligerent country of which they were nationals but to authorize their detention for security reasons. It allows the President an election to detain or remove suspected alien enemies to areas where they could not harm us. (See Sec. 22.) The Act certainly could not have been devised to authorize the President or any executive officer to send able-bodied alien enemies to an enemy belligerent country where they might take up arms against us. It could not have been the congressional intention to authorize the supply of soldiers to an enemy country to bear arms against us. Such would violate the constitutional inhibition against treason. See Sec. 3 of Art. III of the Constitution. If therefore, a state of war with Japan still persists and will continue until peace formally is declared no person asserted by the Government to be a dangerous alien enemy is removable to Japan under that Act or any other act because such a removal in itself would constitute an act of treason unless such a person were exchanged for a prisoner of war. (In his affidavit, R. 152, in No. 12251, Mr. Burling admits it was the government's intention to exchange Japanese aliens and interned Nisei for prisoners of War held by Japan.)

It is to be inferred that the removal to which the Act relates is of a type that would prevent an alien enemy from bearing arms against us and from committing hostile acts against us. It would be conceded, of course, that the Act does not preclude the executive from exchanging hostile alien enemies for American prisoners of war. It is

to be assumed that Congress intended that the President, in his discretion, might arrange also for the voluntary departure or removal of alien enemies laboring under a physical or mental disability along with their alien born children of tender years to points where they could return to their native land. It is not to be assumed, however, that alien enemies who were not physically or mentally incapacitated likewise would be permitted to return to their native land. The Act authorizes the removal of enemy nationals suspected of being a potential menace to our security by transfer to a non-belligerent country or to a place within or without our continental limits and jurisdiction where isolation would render them unable to injure us. Obviously, however, Congress contemplated that only hostile alien enemies who were of military age or were able to contribute services to the enemy cause would be isolated and detained for the duration of war.

The power of removal lodged in the Executive would not seem to be a wholly arbitrary and irresponsible one. Inasmuch as resident nationals of an enemy country are entitled to constitutional rights it would seem that they are entitled, under the due process clause, to a fair hearing on the question of an existing necessity for their internment and removal. The Attorney General granted such an administrative hearing to each German, Italian and Japanese national who was detained under the provisions of the Act and released all except a few of them who were removed to their native lands after the last of the Axis nations surrendered. The renunciants, however, were never given like administrative hearings either on the

grounds or necessity for their original evacuation or for the prolonged imprisonment imposed upon them. Evidently our recent Attorneys General in rotation, following the trail blazed by General DeWitt and the WRA, believe due process to be of such little importance that they withheld it from citizens and reserved it for enemy nationals.

The Alien Enemy Act has lost its efficacy.

Like martial law, in being founded upon necessity, the authority to detain and remove alien enemies under the Alien Enemy Act would seem to terminate when the necessity ceases which called it into existence. It would not seem to require a formal declaration for its termination. The reason therefore would seem to be the necessity rule so aptly expressed in *Ex parte Milligan,* 4 Wall. (U.S.) 2, viz., "As necessity creates the rule, so it limits its duration". The conditions which called it into existence on December 7, 1941, cannot be extended artifically by executive silence or fiat. Mere political expedience neither justifies nor legalizes the continuance of an emergency war power into a postwar period. Congress did not frame the statute to be used as a pretext to extend executive power thereunder beyond the cessation of hostilities. It is not a self-perpetuating statute. The war actually ended on August 10, 1945, when Japan surrendered. September 2, 1945, was officially proclaimed V-J Day by President Truman and on December 31, 1946, he issued a Proclamation which officially proclaimed the "cessation of hostilities of World War II." On February 19, 1947, White House advisors informed the Press (see S.F. Call-Bulletin of that date) that:

> "The end of emergency declaration, expected before mid-summer, if Congress acts promptly on today's recommendations, will be followed later by a declaration of the end of the war itself."

There has not been, however, any official declaration of the end of the war or a declaration of peace made by the Congress or the President. Because of the existence of the cold war with the USSR it is likely that no peace treaty will be entered into between the Allies and Japan within the foreseeable future. Inasmuch as there must be an end to everything in time—and even to executive wartime power which invades fundamental constitutional rights of aliens—it would seem that the Alien Enemy Act, having served its wartime purpose has reached its termination.

On June 21, 1948, the Supreme Court, in *Ludecke v. Watkins,* 335 U.S. 160, reached the conclusion that as at that time the Alien Enemy Act still was enforceable. Whether or not it would take the same view at this late date is a matter for speculation. The validity of detention and doubtlessly of removal is determined by conditions existing at the time an application for a writ of habeas corpus is decided on appeal. See *Stallings v. Splain,* 253 U.S. 339, 343, and *Mensevich v. Tod,* 264 U.S. 134, 136.

The abnormal conditions which exist for a short period following war do not revive emergency war powers which invade fundamental constitutional guarantees. Statutes which depend upon war conditions for their vitality may be extended beyond the termination of war only with congressional approval. Congress has not authorized the protrusion of the Act into the post-war period. Since it has

been on the statute books no previous attempt has been made by any executive officer to restrict personal liberties by stretching its operation beyond the actual war period for which it was intended. Inasmuch as the application of the Act during war suspends the constitutional rights of aliens affected thereby its extension into the post-war period contravenes the 5th Amendment. Rights which the Administration may ignore during time of war may not be suspended thereafter without offending the Constitution. The Attorney General, however, seeks to perpetuate his power under the Act beyond all reason and as though given to unconstitutional action as a matter of executive policy.[14]

Neither the detention nor the removal of alien enemies who once might have been deemed or suspected to have been hostile to us now would seem to be warranted. If the Alien Enemy Act could be used to justify such a detention at this late date it is obvious that, instead of being a war-time measure, it has been distorted by executive practice into a continuously applying statute simply to excuse the permanent detention or deportation of aliens at the whim and caprice of the President or the Attorney General. Such, however, never was the congressional intention. Indeed, there is nothing in the Act that may be construed as delegating to the Executive an authority to wield such an autocratic power beyond the hostility period. The due

[14]The abandonment of price regulations in October, 1946, demonstrated how reluctant the executive branch is to surrender its war-time powers. It waited until the country had been brought to the brink of a general economic collapse and then surrendered its controls only because their retention threatened to produce and did produce a revolt at the polls.

process of law guaranteed by the 5th Amendment excludes any notion that Congress or the President might deprive aliens of their basic constitutional rights. A temporary suspension of those rights finds some justification where an overwhelming public necessity requires emergency measures be taken, as suggested in *Hirabayashi v. U. S.*, 320 U.S. 81, but those rights revive when the emergency terminates.

VIII.

INCONSISTENT ATTITUDE OF THE ATTORNEY GENERAL.

No longer can the public safety be claimed to justify either the detention or removal of persons who were alien enemies during the war period, at least, not with intellectual honesty. The nationals of Italy, Germany and Japan who were within our jurisdiction ceased to be alien enemies upon the unconditional surrender of their governments and, in consequence, became simply "aliens" to whom the Alien Enemy Act no longer applied. Since the end of hostilities the detention and removal of nationals of countries previously hostile to us has become not only untenable but improper and illegal. Since then our ordinary criminal laws alone have been in force and are adequate to preserve the public peace. Their enforcement is sufficient guaranty against criminal acts on the part of citizens and aliens in our midst. They do not require arbitrary implementation by executive fiat.

It is significant that none of the appellees at any time has been accused, tried or been found guilty on any charge of actual hostility or other crime against the nation. The

renunciation hearings had no reasonable relation to any such charge. They involved a mere question whether or not a renunciation was contrary to the interests of national defense. No other question was involved in those pseudo-hearings. A finding by the Attorney General that a renunciation was not contrary to national defense interests was, in itself, a finding that a renunciant was not hostile to us and that he did not present any clear and present danger to our government.[15] In the face of such finding the Attorney General is peculiarly inconsistent in asserting them to be dangerous.

Several months after the proceedings below were commenced the Department of Justice awakened to the realization that if it was to justify a removal program on the ground the renunciants were removable under the Alien Enemy Act it must accord them notice of removal as prescribed by its own regulations which were adopted under authority of Sec. 22 of that Act. Belatedly it set about sending out notices to each then detained person that he or she would be removed to Japan.

Nevertheless, all the interned Nisei except the appellees since then have received outright releases from detention.

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[15]For many months the Department of Justice took the view that renunciation did not transform a person into an alien enemy or a person dangerous to our security. A characteristic statement in Edward J. Ennis' (Director of Alien Enemy Control Unit) form letters to renunciants seeking cancellation of their renunciations evidences that view. His statement, taken from his letter of July 27, 1945, to Yoshio Taniguchi reads as follows:

> "The meaning of this approval is not at all, as you suggest in your letter, a finding by the Attorney General that the renunciant whose application he approves is himself dangerous to the United States. The Attorney General in approving merely finds that to allow the renunciation will not itself injure the interests of national defense."

Before V-J Day the Department held all the internees in detention without threat of removal to Japan. Thereafter it held them for removal to Japan as though they were alien enemies whether or not their renunciation applications had been accepted or rejected. After the pseudo-hearings on the orders to show cause why they should not be removed to Japan had been held and before those examinations had been completed the Department classified 449 as not entitled to release. Thereafter it labeled them alien enemies scheduled for deportation. Thereafter it released a large number of the latter. Thereafter it relaxed the internment on a majority of the remainder and held a few family groups at Crystal City and others at Seabrook Farms. The Department labeled them dangerous one day and harmless the next. Thereafter, all the interned Nisei were released to their counsel.

Several hundred young men who were veterans of the recent war and had served honorably in our military forces found themselves imprisoned without cause in the Tule Lake Center. They had served in 1940, 1941, and 1942 but were released from active duty when the Government, without cause, first discharged them and then proceeded to treat them as alien enemies. It deliberately classified them as "alien enemies" by giving them and all interned males of draft age the draft classification of "4-C" for no reason except that they happened to be of Japanese lineage. In this concentration camp an appreciative government permitted them to meditate upon the gratitude of the Government they had defended willingly and upon the "Four Freedoms" for which they had fought but which were denied them and their families.

After they had been ousted from the service and interned they were subjected to the duress that the Government permitted to exist in that Center. As the result of said mistreatment, repudiation and the duress to which they were subjected they renounced nationality and a grateful Attorney General, after the close of the war, decided to brand them dangerous alien enemies and to remove them to Japan. Many of these abused veterans and members of their families were petitioners in these proceedings. Many more were disappointed young men whom the government for several years refused to draft or to accept as volunteers during their detention. Several hundred of the male petitioners below and a number of the appellees were inducted or volunteered for military service and are serving with honor, a fact which should have convinced the Attorney General that renunciation had nothing to do with disloyalty. All that these ever asked was that the government treat them as citizens and give them a chance to act as normal citizens. Apparently the Attorney General views an honorable military record and tenders of such service as evidence of disloyalty and hostility to this nation. We submit, however, that the rest of the nation views the evidence as conclusive of their loyalty and devotion.

On June 29, 1946, this Court, in *Takeguma v. U. S.*, 156 Fed. 2d 437, 440, declared that renunciants detained in these concentration camps were subject to induction into the armed forces. It was the policy of the Attorney General to permit interned Nisei to register for the draft and to enlist direct from a concentration camp. Army headquarters throughout the nation welcomed renunciants

into the service with full knowledge of the fact of renunciation, recognizing that renunciation had no relationship to disloyalty or hostility to this nation. It is utterly inconsistent executive government action for the Attorney General to have detained and threatened renunciants with removal to Japan while they were being inducted into the Armed Services from imprisonment and the army authorities were willing to accept them.

IX.

DETENTION AND REMOVAL OF APPELLEES IS FORBIDDEN AS BILL OF ATTAINDER AND EX POST FACTO LAW.

In continuing the original unlawful imprisonment of the appellees and in having ordered their internment and removal to Japan the Attorney General usurped legislative power and actually decreed a *bill of attainder* which even Congress is prohibited from passing by Sec. 10 of Art. I of the Constitution. His order is void as an *ex post facto* law or regulation prohibited by Sec. 10 of Art. I of the Constitution because he thereby decreed the act of renunciation to be unlawful and punishable by removal although that act was declared by Congress to be lawful and neither punishment nor other penalty was prescribed for an exercise of that right by Congress.

X.

BANISHMENT IS VOID FOR VIOLATING FIFTH AND EIGHTH AMENDMENTS AND PRESIDENTIAL PROCLAMATION NO. 2655.

Each of the appellees is a native-born resident of the United States and is domiciled in this country. In consequence, the banishment of such persons, whether they be considered citizens or non-citizens, is a type of *infamous punishment* inflicted upon them in the absence of crime on their part and simply because of their color or race and, as such, is forbidden by the 5th Amendment. See *In re Yung Sing Hee* (CC-Ore.), 36 Fed. 437; *U.S. v. Moreland,* 258 U.S. 433; and opinion of Mr. Justice Brewer in *U.S. v. Ju Toy,* 198 U.S. 253, at 269-270, declaring banishment to constitute a *cruel and unusual punishment* forbidden by the 8th and 5th Amendments. See also, *Ex parte Wilson,* 114 U.S. 417, 428.

Congress neither authorized nor approved the detention or banishment of renunciants. Nowhere did it intimate that renunciation would be followed by detention and banishment under the Alien Enemy Act or any other statute. In detaining the renunciants for deportation to Japan the Attorney General exercised extra-constitutional power and usurped the functions of the legislative and judicial branches of the government. In addition he also usurped executive discretionary power in so doing for it is to be noted that Presidential Proclamation No. 2655 contains no direction to him to treat renunciants as though they were alien enemies.

XI.

INTERNMENT VIOLATES 13TH AMENDMENT.

Internment is a condition of slavery and involuntary servitude, imposed not for crime but solely by reason of the appellees' type of lineage and is forbidden by the 13th Amendment. See *Slaughter Houses Cases,* 83 U.S. 36. In the W.R.A. camps internees were put to work assigned by the authorities in charge at peon wages. See *W.R.A. Manual,* Chp. 50.5, par. 6-A et seq. In the internment camps they received less. The camp authorities were not content with having them remain slaves solely of the government, however, and for the private profit of the W.R.A. personnel exploited hundreds of them through the medium of the slave labor racket they established. See R. 285-6 in Nos. 12251-2.

XII.

NATIONALITY REGULATIONS AND RENUNCIATION STATUTE ARE VOID FOR UNCERTAINTY AND FOR CONTAINING UNLAWFUL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER.

In seizing and holding the appellees from 1942 until they were delivered into the custody of the Attorney General in 1945 without charging them with crime, without informing them of the nature and cause of any accusation against them and without affording them trials on the cause or necessity therefor the military and W.R.A. authorities usurped legislative and judicial powers in violation of Arts. I and III of the Constitution and transgressed the guaranty of the 6th Amendment and the due

process clause of the 5th. In essence this treatment was a prejudgment of a body of our citizens occurring in the recesses of the minds of those authorities and in the absence of their victims. In prolonging the detention from 1945 to 1947 when they were released into the custody of their counsel, the Attorney General was guilty of like usurpation of power and like misconduct. The right to wield such judicial power is denied military commanders, federal administrative agencies and executive officers. Executive suspension of the civil rights of civilians outside the actual theatre of war where martial rule necessarily obtains has no constitutional sanction. See *Ex parte Milligan,* 4 Wall. (U.S.) 2, and *Duncan v. Kahanamoku,* 327 U.S. 304, 322.

The evacuation and internment of citizens from 1942 to date without a charge of crime being lodged against them constituted a deprivation of all citizenship rights and hence of citizenship itself. Obtaining renunciations from citizens illegally interned and illegally deprived of all the rights of citizenship without cause, hearings or justification does not validate or justify either the renunciations or the detention or removal of the appellees. It is just an addition to the long series of crimes committed by the Government against them.

The Attorney General knew the appellees were citizens illegally interned and treated as though they were criminal alien enemies and that while so interned and abused that they renounced nationality at his invitation while laboring under duress. Nevertheless, he set himself up as an administrative tribunal-sole to declare them dangerous alien enemies and to order their removal to Japan.

If the renunciation statute, Title 8 USCA, sec. 801 (i), be deemed to vest such a power in the Attorney General it is void as an unlawful delegation of legislative and judicial power prohibited by Arts. I and III of the Constitution. If it were deemed that such power were delegable at all it must be admitted that the power to declare citizenship forfeited is a judicial one beyond the reach of the Attorney General.

The renunciation statute, Title 8 USCA, sec. 801 (i), purports to delegate to the Attorney General legislative and also judicial power to determine the persons from whom he may accept renunciations and the conditions and circumstances under which he may approve renunciations. Such a delegation of authority is prohibited by Arts. I and III of the Constitution. See *Field v. Clark,* 143 U.S. 649, 692. It is also void for uncertainty and for delegating to the Attorney General, an executive officer, an arbitrary and unlimited discretionary authority to approve renunciations without setting up any standards, guides or policies to which he is to conform in approving renunciations. Such a delegation of legislative power is unconstitutional as forbidden by Art. I of the Constitution. *Schechter Poultry Corp. v. U.S.,* 295 U.S. 495, and *Panama Refining Co. v. Ryan,* 293 U.S. 388.

The statute does not expressly or impliedly delegate a power to the Attorney General to declare that the mere act of renunciation transforms a renunciant into an alien enemy or to classify and treat him as such or to detain or deport a renunciant and, in consequence, the action of the Attorney General in detaining the appellees for de-

portation is extra-constitutional and also violative of the due process clause of the 5th Amendment.

Attention is drawn to the fact that although Title 8, Secs. 316.1 to 316.9 of the Nationality Regulations set up by Attorney General Francis Biddle on October 6, 1944, prescribe that hearings be given prospective renunciants before renunciations are accepted the Attorney General's examiners made it a practice to deny them the benefits of counsel. These regulations authorized the government examiners to consider hearsay and the contents of dossiers which were concealed from the renunciant. They gave consideration to such matters in the examination of appellees. The regulations also enabled the examiners to indulge in caprice in determining whether or not acceptance of a renunciation was to be recommended and the Attorney General to indulge in caprice in approving a renunciation. The appellees were the victims of such caprice. The proceedings were in the nature of Star Chamber proceedings. See, Sec. 316.6. Nothing is to be found in these regulations authorizing acceptance of a renunciation from a minor under 21 years of age. The Attorney General, however, accepted renunciations from minors and also from mental incompetents quite indiscriminately. (See R. 288, 307-8 and 465 in R. 12251-2 for names.)[16] Nothing is to be found in the statute, regulations or in the proclamation setting forth what factors shall be given consideration in determining what renun-

[16]Note: In unprinted R. "Designation" filed February 25, 1949, Exh. XXII-1, and in App. XI, par. XXII, of appellant's brief it is admitted that the renunciations of known insane persons were accepted and approved.

ciations shall be accepted or rejected and, in consequence, these matters were left to the unregulated and arbitrary decision of his examiners. The delegation of such legislative powers to the Attorney General in 8 USCA, sec. 801 (i) to determine what unspecified factors are to be given consideration in determining whether or not a renunciation is "not contrary to the interests of national defense" violates Art. I of the Constitution. See *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 88.

President Truman's Proclamation No. 2655 does not declare that a citizen who renounces under the statute thereby becomes an alien enemy or subject to the provisions of the Alien Enemy Act. Neither does it define the conditions or conduct that constitutes past adherence to "enemy governments or to the principles there" which renders alien enemies liable to removal. The Attorney General usurped executive power as well as legislative and judicial power when he formally classified the renunciants as alien enemies and ordered their detention converted into internment and ordered their removal to Japan.

XIII.

RENUNCIATIONS OF INTERNED INFANTS, INCOMPETENTS AND ADULTS WHO ARE NOT SUI JURIS ARE VOID.

Neither in the renunciation statute nor in any other statute has Congress sought to authorize the approval of a renunciation from a minor under the age of 21 years. The Attorney General was not authorized by Congress to accept renunciations from minors. In passing the

statute Congress necessarily must have contemplated its application only to adult persons. If it be assumed that Congress had no fixed age for renunciation in contemplation at the time the statute was enacted its silence on the question and its failure to establish the age creates a statutory ambiguity. In dealing with the rights of a citizen under the age of twenty-one (21) years the Supreme Court has declared the rule to be that in the absence of a clear and unambiguous authorization "rights of citizenship are not to be destroyed by an ambiguity". *Perkins v. Elg,* 307 U.S. 325, 337.

Consequently, the appellees who were under 21 years of age at the time of renunciation were incapacitated by their minority from renouncing and their renunciations are invalid and void.

Attention is directed to the fact that neither the statute nor the nationality regulations authorize renunciations from children of 18, 19 and 20 years of age. It is significant that in the Nationality Act of 1940 Congress terms a minor to be a person under twenty-one years of age. See Title 8 USCA, sec. 501 (g). Nevertheless, the examining agents recommended the approval of renunciations from children and the Attorney General approved such renunciations. In addition, he approved hundreds more after the infants had written him letters rescinding the applications, his letters of approval being mailed to them as late as 1948 when they had attained their majority. As a demonstration of the utter recklessness of the government's attitude toward them, attention is directed to the fact that approval letters were addressed to them at

the concentration camps and delivery was not effected because the camps long had been closed and the internees had been restored to their homes. The government's practice does not seem to have been the result of mere error but a matter of recklessness. We believe that practice not only was unsound but contrary to public policy and violative of the due process of law guaranteed by the 5th Amendment. It also would appear obvious that the petitioners below who were mentally incompetent at the time of renunciation could not be deprived of their citizenship. If unconstitutional as to any person the statute is unconstitutional as to all persons who renounce. See *Norton v. Shelley County,* 118 U.S. 425, where Field, J., states the rule in the following language:

> "An unconstitutional Act is not a law; it confers no rights, it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

The approval of renunciations of adults, minors and mentally incompetent persons during their unconstitutional imprisonment, that is to say, while they were held under duress by the government and subjected to the terrors incident thereto and for which it alone was responsible tainted all of the renunciations with incompetency. In consequence, the renunciation applications and the approvals thereof by the Attorney General are void. See *Upshaw v. U.S.,* 335 U.S. 410; *McNabb v. U.S.,* 318 U.S. 332, 341; *Malinsky v. N.Y.,* 324 U.S. 401, 405.

In addition, we wish to point out that the appellees were interned at the time of renunciation as though they

were alien enemies. At the very time the renunciation examinations were given each was confined in a closed room with government agents and was deprived of the benefit of counsel, witnesses and friends. (See R. 176-177 in No. 12251-2.) This was nothing less than detention existing within an internment for the purpose of obtaining from the internees renunciations which were void *ab initio* under the rule subsequently announced in *Upshaw v. U.S.*, 335 U.S. 410. In consequence, none of the renunciants was *sui juris*.

Further, each internee at the time of renunciation was precluded from asserting and exercising civil rights because of that internment. Each, in fact, was precluded from entering into a renunciation. See, *Trading With Enemy Act,* 50 USCA, Appendix, Sec. 3(a), prohibiting trading which, as defined in Sec. 1 prohibits any "contract, agreement, or obligation" from being entered into by an alien enemy unless specifically licensed so to do by the President. At the time of renunciation each interned citizen had been classified and treated as an alien enemy. However, the President did not license any person to renounce nationality. Consequently, inasmuch as all the appellees were interned as though they were alien enemies and were deprived of all civil rights the Government could not accept renunciations from them. It follows that because they were not *sui juris* they could not exercise the civil right of renunciation.

CONCLUSION.

All their troubles and the degrading treatment to which we have subjected the appellees flow from the first unjust governmental action which has been referred to as a mass evacuation. That enforced exodus of a people, in reality, was nothing but the initial step in an oppressive imprisonment program that continuously held them in duress for a period of over four years. It was imposed upon them simply because their blood was deemed to be tainted because they are descended from ancestors who were subjects of Japan by virtue of the accident of their nativity on Japanese soil. We do not believe that the Attorney General's appetite for justification of the cruel program requires the sacrifice of the appellees simply for governmental appeasement purposes. We believe his unwarranted detention of the appellees and his threat to remove them to Japan were and are lawless and in excess of his jurisdiction. We submit that the judgment of the court below awarding the writs and discharging the appellees from custody should be affirmed.

Dated, San Francisco, California,
February 27, 1950.

Respectfully submitted,
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